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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of	)	
the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

To: The Commission

REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; MONTGOMERY COUNTY, MARYLAND; THE CITY OF LOS ANGELES, CALIFORNIA; THE CITY OF CHILLICOTHE, OHIO; THE CITY OF DEARBORN, MICHIGAN; THE CITY OF DUBUQUE, IOWA; THE CITY OF ST. LOUIS, MISSOURI; THE CITY OF SANTA CLARA, CALIFORNIA; AND THE CITY OF TALLAHASSEE, FLORIDA

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SUMMARY

To some commenters, the OVS option represents a new, alternative paradigm for wireline video distribution. Attached to these reply comments are proposed rules designed to implement this new paradigm. To the LECs, however, OVS appears to represent merely an opportunity to be a cable operator while evading the requirements of the Cable Act. The Commission should reject the LECs' cynical attempts to transform OVS into a quick-and-dirty scheme in which LECs can gain the benefits of cable without its responsibilities.

(1) The Commission's Rules Must Ensure That OVS Is Truly Open to Independent Video Programming Providers. The LECs consistently — but erroneously — suggest that OVS must be allowed to be cable-like so that they can compete with established cable operators. LECs overlook that they can always be cable operators if they wish. The true test for the Commission is: Will its rules make OVS the truly open system Congress intended it to be?

LECs frankly admit that they have a powerful economic incentive to exercise as much control over all OVS capacity as they can. Thus, unless the Commission makes clear bright-line rules to prevent such influence, LECs will invariably seek to construct OVS arrangements designed to favor the video programming providers they prefer on their networks. When the LECs plead for "wide latitude" to exercise their "good faith business judgment," what that really means is the latitude to allow OVS operators to structure OVS like a cable system.

LECs claim that as new entrants in the video distribution market, they will lack market power. But this claim confuses two different markets. Cable and OVS may compete for subscribers, but there is no such competitive alternative available for independent video programming providers. Moreover, in the long run, an OVS operator may well end up with a monopoly, particularly if OVS is given the preferential treatment LECs urge.

Although LECs argue that the ten-day time limit for Commission action on an OVS certification means that certifications must be simple, the reverse is true. Since the Commission must act quickly, LECs must be required to do their homework before filing.

LECs urge against detailed rules in favor of an ad hoc complaint process. Yet no complaint process can work effectively without pre-existing standards. And a purely complaint-driven process would place all the burden on the very independent video programming providers likely to be handicapped by OVS operator practices and to lack the necessary resources to litigate.

Minimal rules necessary to solve these problems must use objective and readily verifiable standards, combined with open, public disclosure of carriage contracts and reports regarding affiliates. Rules proposed by Bell Atlantic et al., in contrast, appear to be designed to do everything possible to make dispute resolution burdensome for independent video programming providers. LECs wish to make independent video programming

providers carry the burden of proof, even though only the OVS operator will have the evidence necessary to prosecute a complaint. The OVS operator should have the burden of proof.

(2) The Commission Must Adopt Strong Nondiscrimination Rules. Our attached proposed rules contain the minimum requirements necessary to protect against discrimination and establish a clear, objective test to show rates are reasonable.

LECs' efforts to analogize to cable fail. The nondiscrimination and reasonable rate requirements of the Act apply to video programmers, not subscribers. Thus, it is essential to make carriage contracts publicly available. Similarly, proposals allowing the OVS operator to freeze an initial channel allocation for long periods of time would defeat the purpose of OVS.

Even as a new entrant, the OVS operator will enjoy market power over video programming providers, who have no distribution alternatives. The Commission therefore cannot presume OVS carriage rates are reasonable. Absent cost-of-service review, the Commission must use objective yardstick criteria based on actual carriage of independent video programming providers.

(3) Open Video Systems Cannot Be Allowed to Avoid Equal PEG Obligations. The Act requires that an OVS operator's PEG obligations be "no greater or lesser" than those contained in the PEG provision of the Cable Act. NYNEX wrongly suggests that an OVS operator's PEG obligations should be limited to channel capacity alone, and not to the facilities, services, and

equipment that are crucial to PEG operations. This proposal is contrary to both the statutory language and its purposes as well.

Similarly misguided are Bell Atlantic's proposal for "generic PEG"; U S West's suggestion of technical problems in tailoring PEG channels to local needs; and NYNEX's attempt to freeze OVS PEG obligations even though a cable operator's PEG obligations may change.

(4) Cable Operators Cannot Become OVS Operators. The statute plainly says that a LEC may become an OVS operator, but that cable operators and other persons may not. A cable operator is also contractually bound and cannot convert its cable system to an OVS without losing all right to be in the public rights-of-way and violating its contract with the local government, creating a takings claim. Congress's stated purpose for creating OVS has no application to cable operators.

(5) OVS Certification Gives No Access to Local Rights-of-Way. Some LECs argue that the OVS provision somehow preempts state and local authority to manage and to receive fair compensation for the use of their public rights-of-way. Not only do these preemption arguments lack any support in the statute; in addition, their acceptance in Commission rules would trigger massive litigation, delaying the OVS experiment indefinitely for the sake of an essentially frivolous argument.

Neither Title VI, nor the new OVS provision, makes any express reference to preempting any state or local requirement to obtain a franchise or similar authorization. Nor can the LECs

present any argument to show implied preemption. On the contrary, the legislative history makes clear that state and local governments retain a role with respect to OVS.

In any event, the OVS provision cannot constitutionally be read to preempt state or local right-of-way authority. LECs improperly ask the Commission not merely to preempt the field, but to appropriate the field of local streets and rights-of-way. Even if LECs would like a subsidy of free use of state and local rights-of-way, that property is neither Congress's nor the Commission's to give.

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To: The Commission

The National League of Cities; the United States Conference of Mayors; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; the City of Los Angeles, California; the City of Chillicothe, Ohio; the City of Dearborn, Michigan; the City of Dubuque, Iowa; the City of St. Louis, Missouri; the City of Santa Clara, California; and the City of Tallahassee, Florida, by their attorneys, and, where appropriate, on behalf of their members, hereby file the following reply comments in response to the opening comments and the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, released March 11, 1996.

I. INTRODUCTION

To some commenters, the open video system ("OVS") option represents a new, alternative paradigm for video service. To the local exchange carriers ("LECs"), however, it appears to represent merely an opportunity to evade the requirements of the Cable Act by running a cable system under another name. The Commission must reject the LECs' brazen attempts to water down OVS into a quick-and-dirty scheme in which LECs can gain the benefits of cable without its responsibilities.

Rather than repeating the arguments made in our initial comments,[1] the following reply comments will first indicate the fallacy of the general approach taken by the LECs in the initial comments. We will then address certain specific arguments made in the initial round of comments, to the extent to which further discussion is necessary in addition to the treatment in our initial comments. Finally, a set of proposed regulations is attached in response to the Commission's request in ¶ 93 of the NPRM.

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[1] Comments of the National League of Cities; the United States Conference of Mayors; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; the City of Los Angeles, California; the City of Chillicothe, Ohio; the City of Dearborn, Michigan; the City of Dubuque, Iowa; the City of St. Louis, Missouri; the City of Santa Clara, California; and the City of Tallahassee, Florida (April 1, 1996) ("Comments of NLC et al.").

II. THE PURPOSE OF THE OVS RULES IS TO DEFINE A NEW COMPETITIVE OPPORTUNITY, NOT MERELY CABLE UNDER ANOTHER NAME.

A. LECs Can Always Be Cable Operators.

Congress intended OVS to be a new model distinctively different from the cable model: an open transmission system, cable-like for a third of its capacity, but common carrier-like as to the other two-thirds.[2] As commenters noted:

> The consequence of trying to operate an OVS system like a cable television system will be adverse rulings in complaint cases, and a prompt need to issue specific rules to deal with such a flagrant subversion of the very purpose of this scheme.[3]

If, as the LECs seem to believe, the statute had intended OVS to be simply cable in disguise, it would make no sense: the cable option would be eviscerated, since no LEC would choose that route if it could be a cable operator under OVS without all of the Title VI obligations. The structure of the four options made available to LECs under the Telecommunications Act of 1996 ("Act" or "1996 Act") makes sense only if OVS is viewed as a significantly different option from cable.

The LECs consistently suggest that OVS must be allowed to be cable-like so that they can compete with established cable

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[2] Comments of NLC et al. at 2-5.

[3] Comments of Alliance for Public Technology at 9 (April 1, 1996) ("APT Comments"). See also APT Comments at 4-6; Comments of Time Warner Cable at 4, 18 (April 1, 1996) ("Time Warner Comments").

operators.[4] But they ignore the obvious. If a LEC believes that it needs cable-like flexibility to compete with cable operators, then the Act specifically allows it to be a cable operator.

Thus, whenever LECs demand wide discretion and special advantages for OVS systems in the name of competition, the Commission should repeat to itself: "*The LEC can always be a cable operator.*" Because the cable option is always available, the Commission is free to define OVS independently in accordance with the statute, without in any way deterring competition.[5]

The LECs' comments systematically downplay the cable option in such a way as to obscure this central fact. For example, joint comments filed by Bell Atlantic and five other telephone companies argue: "Unless the open video system itself can be a viable competitor, there will be neither inter-system competition nor intra-system competition."[6] But that is simply untrue. If OVS, as defined by Congress, is not a viable competitor to cable, there will still be competition — it will just be among cable

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[4] See, e.g., Comments of Bell Atlantic, BellSouth, GTE, Lincoln Telephone, Pacific Bell, SBC Communications at 13 (April 1, 1996) ("Bell Atlantic Comments").

[5] USTA, for example, declares that LECs will pursue the other regulatory options if they do not like the OVS rules. Comments of the United States Telephone Association at 3 (April 1, 1996) ("USTA Comments"). That may be true, but whether or not LECs choose OVS, they are free to compete.

[6] Bell Atlantic Comments at 13. Cf. Comments of NYNEX Corporation at 32 (April 1, 1996) ("NYNEX Comments") (rules giving special advantages to OVS are necessary to encourage telephone company entry into local video markets).

systems rather than cable versus OVS. The LEC can always be a cable operator.

Thus, the repeated suggestion in the LECs' initial comments that the Commission's rules must be especially lax because of their "competitive importance"[7] is wholly misplaced. The Commission's responsibility under the statute is to fill out the congressional sketch with a full-bodied alternative to cable, so that the market can decide whether such an alternative will succeed or fail in competition with cable.

Bell Atlantic et al. suggest that the Commission should evaluate all proposed rules according to whether they will make OVS an "attractive alternative" to cable — as if it were the Commission's job to be a cheerleader for OVS, regardless of market forces or statutory requirements.[8] This "litmus test" is entirely wrongheaded. On the contrary, the Commission's job is to fulfill the statutory mandate for OVS, and the proper litmus test is: Will these rules make OVS the truly open system Congress intended it to be, or another closed system like cable masquerading under another name? The market will then determine whether the new LEC competition prefers to take the form of OVS or of cable.

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[7] USTA Comments at 20.

[8] See Bell Atlantic Comments at iii-iv, 3-5.

B. The LECs Will Exclude Independent Programmers If the Commission Does Not Prevent Them.

The LECs' opening comments make plain that they will seek to control all OVS capacity if the Commission lets them. This is clear from the repeated assertions that the LECs prefer cable, where they control all the programming, to open access. Thus, Bell Atlantic, BellSouth, GTE, Pacific Bell, SBC, and Lincoln Telephone state:

> The market and the available technology are better suited to cable systems, over which operators exercise substantially greater editorial control than open video system operators will be permitted.[9]

USTA, speaking for the telephone industry as a whole, agrees:

> This ability to select all of the programming on the system under the cable option is preferable to the open video system alternative, in which the total number of channels that the operator may program are limited.[10]

In expressing this clear preference for editorial control of all channels, the LECs acknowledge that they have every incentive to influence all OVS capacity if they can. Thus, unless the Commission makes clear bright-line rules to prevent such influence, the LECs will construct OVS arrangements designed to favor the independent video programming providers they prefer on their networks.[11]

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[9] Bell Atlantic Comments at 3.

[10] USTA Comments at 10. Cf. U S West, Inc. Comments on Open Video Systems at 14 (April 1, 1996) ("U S West Comments") (few if any LECs would be willing to construct a system on which they do not control all capacity).

[11] The LECs' declared preference for complete programming control is supported by the actual history of video dialtone. See Joint Comments of Cablevision Systems Corporation and the

Congress, of course, recognized that a LEC would wish to gain both the advantages of OVS (reduced regulation) and the advantages of cable (complete control of capacity). If Congress had wished to allow that result, it could simply have repealed the Cable Act and replaced it with OVS. But Congress did not do so. Rather, it created a conscious trade-off between cable and OVS: an OVS operator cannot control all its channel capacity (two-thirds of which is always subject to non-discriminatory use by independent video programming providers at reasonable rates and terms). Congress, however, relied on the Commission to take the specific steps necessary to prevent LECs from circumventing the two-thirds rule.

Thus, when the LECs plead for "wide latitude"[12] to exercise their "good faith business judgment,"[13] what that really means is the latitude to allow OVS operators to structure the entire

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California Cable Television Association at 6-8, 13 (April 1, 1996) ("Cablevision Comments"); Comments of Tele-Communications, Inc. at 8-9 & n.26 (April 1, 1996) ("TCI Comments").

The LECs' willingness to discriminate extensively among video programming providers may also be seen in the wide range of factors they view as "reasonable" discrimination among such providers, including program content and market value; the type of programming offered (premium or pay-per-view); full-time versus part-time carriage; volume discounts; discounts for long-term commitments; financial requirements; indemnification requirements; assurances regarding rights to programming; interconnection and technical standards; an undefined "need to compete with incumbent cable operators"; customary industry practices; customers' expectations; demand; and technical limitations. See Bell Atlantic Comments at 9, NYNEX Comments at 10.

[12] USTA Comments at 11.

[13] Bell Atlantic Comments at 7.

system offering like a cable system. This is because the LECs have already conceded, in good faith, that their business judgment is: complete channel control (the cable model) is better. The LECs may thus be relied upon to use any loophole the Commission leaves open to keep control of all programming in their own hands. In light of the blunt candor in the LECs' opening comments, it would be inexcusably naive of the Commission to suppose otherwise.

Undoubtedly, the Commission should keep to a minimum the rules necessary to ensure that an OVS is truly an open system. But the Commission must make rules sufficient to ensure that an OVS is truly an open system — to "prohibit" discrimination and "ensure" reasonable rates, as the statute requires.[14]

The LECs suggest that the Commission need not make such rules because market forces will suffice to keep OVS honest.[15] But the LECS themselves have already provided the rebuttal to this claim. They believe that market forces favor cable. Thus, if left to market incentives, the LECs will certainly treat OVS as a cable system with relaxed regulatory requirements, circumventing the intent of Congress. Rather than letting the market decide whether LECs will choose OVS or cable, the LECs want the Commission to override market forces by making OVS a far more attractive option than cable.

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[14] 1996 Act, sec. 302(a) (adding new 47 U.S.C. § 573(b)(1)(A)) (emphasis added).

[15] See, e.g., USTA Comments at 8.

The LECs claim that as new entrants in the video distribution market, they will lack market power.[16] To begin with, this claim confuses two different markets, as more fully discussed below in section III.A.1. There is no existing market available to independent video programming providers for video carriage, as distinct from the market in which program producers may sell their programming to resellers such as cable operators.[17] Thus, the OVS operator will have market power in the carriage market. Assuming arguendo that competition for end-user subscribers may constrain the OVS operator's retail prices to subscribers, it will place little or no such competitive constraint on the rates or terms available to independent video programming providers for carriage on the system.

Moreover, even in the subscriber market, it is far from clear that OVS will lack market power. The best the Commission can hope for from OVS-cable competition is duopoly, in which only two facilities-based competitors dominate the market completely. It is at least as likely in the long run, however, that either the OVS or cable operator will end up with a monopoly. Indeed, an OVS operator, if given all the advantages of a cable system

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[16] See, e.g., USTA Comments at 13-15; NYNEX Comments at 22.

[17] The "alternative distribution channels" for programming referred to in USTA Comments at 14 are not equivalent channels at all. A program producer that wishes to sell its programming wholesale, to programming packagers, may have a choice among cable operators, OVS operators, DBS operators, and the like. But a program producer that wishes to sell its programming retail, directly to subscribers (and thus to gain the additional profit from cutting out the wholesaler), has no such choices.

and further regulatory advantages in addition, could well drive the cable competitor out of business.[18] Thus, the Commission cannot assume that every OVS will in fact face competition. The Commission must therefore make rules capable of preventing OVS from degenerating into cable even where market forces do not restrain the OVS operator.

C. The LECs' Demands for "Flexibility" Are a Plea For Regulatory Advantage.

The LECs seek to deter the Commission from establishing the necessary rules by demanding that they "should be given every incentive to choose this option."[19] But this plea that the Commission favor OVS above other options is misguided. Even the cause of competition does not require OVS to prevail over cable, since the LEC can always be a cable operator. In addition, however, the LECs seek to downplay the nature of the advantage they seek.

LECs seek to wrap themselves in the flag of competition: thus, for example, Bell Atlantic et al. declare that "[c]ompetitive markets require regulatory forbearance."[20] But in fact the LECs are not asking simply for forbearance. Rather, they want a specific new form of regulation that gives them new

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[18] If it were held to be possible to convert a cable system to an OVS, as discussed in section V.A, the Commission could also face a scenario in which the incumbent cable operator became an OVS operator in the absence of any LEC competition.

[19] USTA Comments at 9. See also NYNEX Comments at 4; Bell Atlantic Comments at 6-7.

[20] Bell Atlantic Comments at 30.

rights (including the right to provide video programming to subscribers) and frees them from the associated conditions and responsibilities (embodied in Title II and Title VI).

The LECs are looking for regulatory incentives to overcome what they perceive as the market incentives that favor traditional cable.[21] Thus, USTA revealingly speaks of the "regulatory incentives for a LEC to choose the open video system option."[22]

In effect, the LECs are asking for the benefits of industrial planning, not the free market. In contrast, the Commission's proper guide is one to which the LECs give only lip service: "The marketplace, not the government, should decide what this new service can become."[23] The Commission must implement the unique OVS model intended by Congress, and let the chips fall where they may, confident that even if the market does not favor OVS, there will still be competition, because a LEC can always be a cable operator.

USTA argues that the Commission need not add anything to the statutory requirements because the OVS provision is "an unusually detailed statutory framework."[24] Nothing could be further from

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[21] See Bell Atlantic Comments at 3; USTA Comments at 10 (quoted above).

[22] USTA Comments at 10.

[23] NYNEX Comments at iv.

[24] USTA Comments at 7. See also id. at 8 (Congress established OVS framework with "precision"). On the contrary, NYNEX is closer to the mark in calling OVS an "inchoate concept" (NYNEX Comments at 28), though NYNEX then inconsistently refers

the truth. In the Act, Congress stated the binding, governing principles for OVS very concisely, and left to the Commission all the responsibility for specific rules that comport with those principles. Thus, a single section of the Communications Act lays out all the statutory requirements for OVS, while Congress devoted 28 such sections to cable. The OVS provision cannot function without sound implementing rules from the Commission. Congress recognized this by specifically instructing the Commission to make such rules.[25] Such an instruction would be most peculiar if, as the LECs allege, Congress had really meant that the Commission should make no additional rules at all.

In fact, the specific requirements of the OVS provision demand implementing rules. This is because the nondiscrimination and reasonable-rates requirements are not self-executing principles. The Commission need not look far for examples: cable leased access has failed thus far to produce a viable market for carriage of independent programmers, under essentially the same minimal conditions that the LECs wish to apply to OVS.[26]

Congress has already defined the "reduced regulatory burdens"[27] for which an OVS operator is eligible. These

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to the statute as a "comprehensive" regulatory scheme, id. at 31.

[25] 1996 Act, section 302(a) (adding new 47 U.S.C. § 573(b)(1)).

[26] See, e.g., APT Comments at 4 n.1 (leased access was intended to alleviate stranglehold of cable on programmer access, has failed to do so).

[27] 1996 Act, section 302(a) (adding new 47 U.S.C. § 573(a)(1)).

regulatory benefits include exemption from rate regulation under Section 623; from the federal cable franchising obligations of Title VI, including the renewal process under Section 626 (the Act does not appear to require a renewal period for OVS certifications); from franchising authority-imposed facilities requirements under Section 624; and from cable consumer protection requirements under Section 632. The LECs cannot reasonably ask the Commission to excuse them also from the open access obligations that Congress specifically imposed, simply in order to give them a still more attractive choice than their cable option.

The LECs argue in effect that the OVS option will be a dead letter unless the Commission gives them what they want. If the Commission bowed to the LECs' demands for regulatory favors, however, the cable option would be a dead letter. And the statute certainly did not intend that. Rather, Congress intended all four options to be available as ways in which LECs could compete in the free market.[28]

D. The LECs' Demands for Pro Forma Certification Conflict With the Statutory Time Limit On Approval.

The LECs are curiously attached to the argument that the ten-day time limit for Commission action on an OVS certification means that it must be very simple for the LEC to put together

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[28] See USTA Comments at 5 ("Congress clearly intended that all of the video entry options established by the statute should be viable alternatives").

such a certification.[29] The reverse is true. Because the Commission must act quickly, review of the certification must be by a checklist approach, in which the validity and completeness of the certification is evidence on its face. But that means that the LEC must be required to do its homework before filing, so as to enable the Commission to do its job in the shortest possible time.[30]

As pointed out in our initial comments, the Commission cannot ease the burden of the ten-day review period by issuing merely a facial approval at the end of ten days.[31] At least one LEC also recognizes that this approach is unacceptable.[32] While the Commission's approval must always be subject to review if a dispute arises, that approval may in fact trigger the building of a new communications network, with the associated commitments of funds and personnel and the associated impact in terms of street cuts and other construction. Thus, Commission approval cannot be treated as a trivial or pro forma matter.[33] Rather, the LEC applicant must be required to make a showing that is sufficiently

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[29] See, e.g., Bell Atlantic Comments at 31; USTA Comments at 20-21; U S West Comments at 22; NYNEX Comments at 26.

[30] Cf. Comments and Petition for Reconsideration of the National Cable Television Association, Inc. at 19 (April 1, 1996) ("NCTA Comments"); TCI Comments at 19-21 and Cablevision Comments at 4 n.16 (endorsing a "letter perfect" standard for review of certifications).

[31] Comments of NLC et al. at 71.

[32] See U S West Comments at 23.

[33] See NCTA Comments at 37; Time Warner Comments at 15-16.

thorough and complete to permit the Commission to verify on the face of the filing that the LEC is and will be in compliance with the Commission's rules.

The "quick-and-dirty" certification advocated by the LECs would in any case present serious constitutional issues. Construction of an OVS will necessarily affect many persons' rights — local governments, PEG programmers, independent video programmers, incumbent cable operators, and others. Any federal approval of that construction must therefore be subject to the constraints of due process. Thus, Congress cannot be supposed to have intended the ten-day requirement to require such a pro forma process. Indeed, even if Congress had intended to do so, due process would require more. Congress intended to promote the information highway, but due process forbids the "information railroad" that would result if a LEC could railroad through a pro forma certification on ten days' notice.

E. The LECs' Preference For A Cumbersome Dispute Resolution Process Without Standards Is a Plea For Regulatory Advantage.

1. A dispute resolution process without standards will not meet the statutory requirements.

The LECs urge the Commission to dispense with detailed rules in favor of a complaint process to resolve disputes.[34] Yet no complaint process could work effectively without pre-existing standards, embodied in Commission rules, to define how disputes

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[34] See, e.g., Bell Atlantic Comments at 7; USTA Comments at 9, 11, 17; NYNEX Comments at 5, 29-30.

are to be resolved. The LECs, however, have proposed nothing whatsoever to ensure that such a process could prohibit nondiscrimination and ensure reasonable rates, as the statute requires.[35] Instead, USTA rails against the imposition of "*a priori*" rules[36] and claims that *a posteriori* corrections will take care of every problem, without offering a shred of evidence that such an approach will work. In fact, the cable leased access experience, coupled with the LECs' own declared preference for control of all programming, makes clear that USTA's approach will not work.

A purely complaint-driven process would, of course, place all the burden of enforcement on the independent video programming providers likely to be disadvantaged by OVS operator practices. Yet it is exactly these independents who are likely to lack the necessary resources to litigate such issues, and to be critically disadvantaged by any delays in obtaining relief.[37] As if this were not enough of an obstacle, Bell Atlantic et al. seek to raise the bar even further, placing even greater burdens on any complainant.[38]

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[35] The LECs' demand for regulatory "certainty" is thus wholly one-sided. See, e.g., USTA Comments at 3; U S West Comments at 12. The LECs would afford no such certainty to video programming providers, who, on the LECs' approach, would need to raise complaints in the complete absence of concrete rules or standards.

[36] See, e.g., USTA Comments at 4, 11, 15.

[37] See Comments, American Cable Entertainment et al. at 17 (April 1, 1996) ("ACE Comments").

[38] Bell Atlantic Comments at 10.